No. 15,611

United States Court of Appeals

For the Ninth Circuit

HARRY L. MARSHALL, JR.,
Appellant,

vs.

WESTFAL-LARSEN & CO., GENERAL STEAMSHIP COMPANY and BJARNE SELLEVALD,
Appellees.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

There is a point in this case that both the trial court and this court entirely overlook, a point so clear that he who runs may read; a point to which no answer can be made and which is decisive.

The proposition is this: Respondent, in the performance of its obligation to exercise the highest degree of care to protect Marshall, was under a duty to provide him with a safe means of disembarking

and with assistance in disembarking. It was not up to Marshall to secure these things for himself, but it was up to respondent to supply them. The admiralty doctrine of comparative negligence applies to this case. No one denies this, although this court does not refer to this doctrine in its opinion. If the means supplied to Marshall to disembark were so unsafe that he was negligent in using them, then respondent in furnishing Marshall with such means must have violated its duty to use the highest degree of care to protect him; therefore, under the admiralty doctrine of comparative negligence, respondent is liable, not for the full amount of damages suffered by Marshall, but for a fair proportion of such damages. There is absolutely no escape from this argument. We respectfully request this court, in fairness to Marshall, to consider it.

What this court decided in this case will, if its decision stands, undermine the old and salutary principle that a common carrier of passengers must exercise the highest degree of care to protect them.

This court, in reviewing the evidence which it says supports the trial court's findings to which we are about to refer, says:

> ". . . As Marshall descended the gangway, the Captain was behind him. Two seamen were on the barge scraping and painting the side of the vessel. Assistance was available to Marshall in reaching the barge, if he had wished it, but, when he arrived at the lower platform of the gangway, he decided to jump . . .
>
> "Marshall testified that the Captain was close behind him and that he jumped because he had

> the impression from the silence of the Captain that the latter had commanded Marshall to jump. Marshall testified he saw no one on the barge and that he heard no warning. . . ."

Marshall at no time said that the captain "commanded" him to jump. What he said was that when he reached the lower platform of the gangway, he paused there for any instructions the captain might want to give him and that when the captain said nothing, he concluded that the captain by his silence was directing (not "commanding") him to jump.

This court, after saying that the evidence reviewed by it supports the trial court's findings that the vessel furnished Marshall with a safe means of disembarking and provided efficient officers and employees to superintend his disembarking, states the crux of its opinion, that is, its decision which, as authority, will control the disposition of other cases in this circuit. It says:

> ". . . If Marshall decided not to wait for assistance when he could see that there was a possible hazard, *he assumed the responsibility.* It was found also that he disregarded a warning shout of a crew member. *His want of due care in these matters prevents his recovery.*" (italics ours)

It thus appears that the proposition held by this court—the proposition for which the opinion will stand as authority—is that when a vessel furnishes a passenger with a means of disembarking which is hazardous, the passenger must wait or call for assist-

ance in the use of such means, and if he does not do so, he assumes the risk and such negligence on his part precludes his recovery; the passenger must wait or call for assistance under such circumstances even when the master of the vessel—the officer upon whom rests the primary duty to exercise the highest degree of care to protect him—is superintending his disembarkation and does absolutely nothing to provide assistance for him.

This decision is a direct and clear repudiation of the rule that a carrier must exercise the highest degree of care to protect its passengers. It is a direct and clear repudiation of the principle that a master of a vessel is charged with a special duty with respect to his passengers, a duty to use "the care, skill and prudence which an exceedingly competent and cautious man would bring to the task in like circumstances".

It is a decision that a vessel may furnish a passenger with an unsafe means of disembarking, and then prevent him from recovering for his injuries in using such means on the ground that he was negligent in using them.

Since Marshall argued that the doctrine of comparative negligence should be applied to the case, this court, we respectfully submit, in fairness to Marshall, should have considered the point and not have ignored it. Despite the fact that the court did not allude to the point, its decision is an implicit, and at the same time, an obvious repudiation of the doctrine.

We respectfully submit that the decision is unjust to Marshall; that it violates old and fundamental principles; that it creates bad law; and that therefore a rehearing should be granted.

Dated, San Francisco, California,
June 10, 1958.

Morse Erskine,
Erskine, Erskine & Tulley,
Attorneys for Appellant and Petitioner.

Certificate of Counsel.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
June 10, 1958.

Morse Erskine,
Of Counsel for Appellant and Petitioner.